IN THE

# SUPREME COURT OF THE UNITED STATES

No.

OCTOBER TERM, 1940

JOHN H. McGLOON,
*Petitioner,*

*against*

THE UNITED STATES OF AMERICA,
*Respondent.*

## BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

### Statement

The arguments addressed to the questions presented by the foregoing petition will be developed in the within brief more fully than was possible without unduly lengthening the petition itself.

### Jurisdiction

The decision affirming the judgment of conviction was made on the 30th day of December, 1940, and the judgment of the United States Circuit Court of Appeals was

entered on the 15th day of January, 1941 (pp. 65-66, fols. 65-66). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended (28 U.S.C.A. Sec. 347(a)), and under the Rules of Practice and Procedure in Criminal Cases promulgated May 7, 1934.

### The Statutes Involved

The statutes involved are set forth in the Appendix, *infra,* page 23.

## POINT I

**That portion of the penal statute under which the indictment is drawn is unconstitutional in that it sets up no ascertainable and immutable standard of guilt.**

The Securities Exchange Act of 1934 (15 U.S.C.A. Chap. 2B) was enacted to provide what was felt to be necessary regulation of securities transactions. The necessity for such regulation is proclaimed in Section 2 of the Act (15 U.S.C.A. Sec. 78b). The Act contains further provisions relating to transactions on registered and unregistered exchanges and exemptions from the requirements of registration (15 U.S.C.A. Secs. 78e and 78f).

There is also a provision, referred to in the indictment, relating to the filing with securities exchanges of periodical and other reports under rules and regulations prescribed by the Securities and Exchange Commission (15 U.S.C.A. Sec. 78m).

The latter provision directs the issuer of a security registered on a national securities exchange to file information, documents and reports with the exchange in

accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate for the proper protection of investors and to insure fair dealing in the security. The statute does not, as its language would lead one to believe, specify in this section or elsewhere the information, documents or reports required to be filed, but leaves it to the Commission to require by appropriate rule the filing of such information, documents and reports as it may see fit.

This section and 15 U.S.C.A. Section 78w, together with the penal provision (15 U.S.C.A. Sec. 78ff), appear to be the basis for the charge in the indictment. The penal provision makes it an offense for any person wilfully and knowingly to make a statement *in* an application, report or document required to be filed under this Act or any rule or regulation promulgated thereunder, which statement is false or misleading with respect to a material fact.

The power of the Securities Exchange Commission to make rules and regulations necessary for the execution of the functions vested in it by the Act is contained in Section 23 of the Act, as amended (15 U.S.C.A. Sec. 78w).

The foregoing section when read in conjunction with the powers vested in the Commission under Section 78m, subdivision (b) clearly demonstrates that the Commission has the power of making rules and regulations to promote the legislative object at hand, a violation of which shall be deemed a crime under the provisions of 15 U.S.C.A. Section 78ff.

However, one scans the indictment upon which the judgment of conviction herein was entered in vain in an effort to find anything therein contained which brings petitioner within the provisions of the statute. It does

not allege any facts showing that he was an issuer of securities, and it does not appear that he was a person subject to the provisions of Section 78m and required to file information, documents or reports in accordance with rules of the Commission. He is not described in the indictment as a member of an exchange or a broker, or dealer in securities. There are no allegations of any kind to show that he is subject to the provisions of the Securities Exchange Act, and he is, therefore, not included within the provisions of the penal statute which can only be considered to refer to persons who are issuers of securities, exchanges, brokers or persons engaged in the securities business. Petitioner is therefore not identified in the indictment as a person required to comply with the Act.

If amenable at all to the Act, petitioner is made so by the provision empowering the Securities and Exchange Commission to promulgate rules and regulations in respect of its enforcement. Thus, the indictment charges petitioner with making certain false and misleading statements with respect to material facts in certain unspecified applications, documents and reports required to be filed with the New York Stock Exchange in accordance with the rules and regulations of the Commission; but it nowhere appears in the indictment that petitioner is a person who is subject to such rules and regulations. An examination of the statute shows that the delegation by Congress to the Securities and Exchange Commission of this power to make rules and regulations, a violation of which shall constitute and be punished as an offense, is not circumscribed by those definite standards and limitations necessary to validate a delegation of power to an administrative agency of the executive branch of the Government, and is therefore unconstitutional.

While it is true that Congress may empower governmental agencies to issue rules and regulations having the force of law, for the violation of which one may be punished, nevertheless, such delegation of authority must be confined within certain definite statutory limits. In other words, there must be a definite, ascertainable and immutable standard of guilt set up in the statute itself, so that the public may know what is forbidden and what permissible. (*United States* v. *L. Cohen Grocery Co.* (1921), 255 U. S. 81.)

The statute cannot, as it undertakes to do here, simply say that when the Securities and Exchange Commission in its judgment requires a certain thing to be done, failure to do it shall be a crime, or that when the Commission orders a thing done in a certain way, failure to do it precisely that way shall be punished as a crime. For to do so, obviously, is to put the citizen in a position where he cannot tell from an examination of the statute whether what he is doing or proposes doing is a criminal act. Conduct may not be declared criminal by the declaration or ruling of an administrative agency which is a part of the executive branch of the Government.

The Congress alone can define crimes. However, a governmental agency can, within the definite statutory limits set by Congress, make rules, the violation of which may constitute an offense, provided that Congress has by statute placed the necessary limitations upon the rule making power. Manifestly, Congress cannot say, as it tries to do so in the instant case, that disobedience to whatever the Securities and Exchange Commission ordains or may in the future choose to ordain in respect of the filing of any documents with a national securities exchange upon which an issue of stock is registered, shall be a crime and punishable as such. To validate such a delegation of

authority is not only to say that Congress by a general declaration on a subject can abdicate to the executive branch of the Government the purely legislative function of defining crimes, but also that the legality or illegality of a given act shall depend upon the changing edicts and variant views of an administrative body.

As was said by this Court in *United States* v. *Eaton* (1892), 144 U. S. 677 at page 688:

> "Regulations prescribed by the President and by the heads of departments, under authority granted by Congress, may be regulations prescribed by law, so as lawfully to support acts done under them and in accordance with them, and may thus have, in a proper sense, the force of law; but it does not follow that a thing required by them is a thing so required by law as to make the neglect to do the thing a criminal offence in a citizen, where a statute does not distinctly make the neglect in question a criminal offence."

The statute under consideration is plainly lacking in that ingredient of precision so essential to the lawful exercise of the legislative will in respect of the conduct of citizens. No bounds or limits are set up on the roving ambition for power of the executive arm of the Government. What the citizen is to be allowed to do is not prescribed by statute, nor has the Congress even sketched in the broad outlines of the restraints sought to be imposed, leaving it to the Commission to fill in the details. Instead, it has in one provision attempted to vest in the Commission authority to prescribe certain forms of conduct, without anywhere undertaking to place limits upon the scope of that authority, and in the other provision to punish as criminal all wilful and knowing departures from such administratively prescribed forms of conduct. In other

words, the statute leaves it to the Commission exclusively to prescribe the rules of conduct, and all that Congress has done is to say what the punishment shall be for infractions of such rules. Under this arrangement, the test of criminality is dependent not upon a fixed objective standard set out in the statute itself, but upon the subjective and shifting criteria of an administrative branch of the executive arm of the Government. Such variable standards of conduct, changing with the philosophy and viewpoint of the Commission's personnel and with the passing of time, leave even the most prudent and law-abiding citizen in doubt as to the legality of a contemplated course of conduct. The nature of the power attempted to be delegated is so broad and unrestricted that one can only conjecture what and where its changing applications will be. In short, the citizen is left to guess whether a given course will be lawful or unlawful for him to pursue, for nowhere in the statute will he find a fixed line of demarcation between what is lawful and what is criminal.

As this Court said in *Jones* v. *Securities and Exchange Commission* (1936), 298 U. S. 1, 23-24, where the Commission sought to pursue a stop order proceeding and compel the petitioner to produce books and records and give testimony after he had withdrawn a registration statement before its effective date:

> "The action of the Commission finds no support in right, principle or in law. It is wholly unreasonable and arbitrary. It violates the cardinal precept upon which the constitutional safeguards of personal liberty ultimately rest—that this shall be a government of laws—because to the precise extent that the mere will of an official or an official body is permitted to take the place of allowable official

> discretion or to supplant the standing law as a rule of human conduct, the government ceases to be one of laws and becomes an autocracy. Against the threat of such a contingency the courts have always been vigilant, and, if they are to perform their constitutional duties in the future, must never cease to be vigilant, to detect and turn aside the danger at its beginning. The admonition of Mr. Justice Bradley in *Boyd* v. *United States,* 116 U. S. 616, 635, should never be forgotten: 'It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. * * * It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis.*' ''

Such a delegation of authority as that attempted in the case at bar is unconstitutional. Similar attempts in the past to delegate authority in this manner have been struck down by the Courts as an improper surrender of a legislative function by the Congress to the executive branch of the Government, and as failing to provide that element of definiteness and certainty which is so necessary to insure full protection to the rights of the accused.

> *United States* v. *L. Cohen Grocery Co., supra;*
> *A. B. Small Co.* v. *American Sugar Refining Co.* (1925), 267 U. S. 233;
> *International Harvester Co.* v. *Kentucky* (1914), 234 U. S. 216;
> *American Seeding Machine Co.* v. *Kentucky* (1915), 236 U. S. 660, 662;
> *Weeds Inc., et al.* v. *United States* (1921), 255 U. S. 109.

## POINT II

**The indictment fails to charge the commission of a crime.**

The indictment seeks to bring the charge within the provisions of the penal section of the Securities Exchange Act of 1934, which, insofar as is here material, provides as follows (15 U.S.C.A. Sec. 78ff):

> "Any person who willfully and knowingly makes * * * any statement in any application, report or document required to be filed * * * which statement was false or misleading with respect to any material fact * * *"

shall be punished in the manner therein prescribed.

Thus, the statute condemns the making of a statement *in* any application, report or document required to be filed.

The indictment, however, attempts to charge as a crime the alleged making of "false and misleading statements with respect to material facts in certain applications, documents and reports filed * * * with the New York Stock Exchange * * *." No charge anywhere appears that the petitioner made a statement *in* any application, report or document. The charge, if anything, is that McGloon made a statement "with respect to material facts" in some unspecified writing. In other words, he is charged only with having made false statements about something that was in the applications, reports and documents, not false statements in the applications, documents and reports themselves.

It is manifest from a reading of the statute that the crime defined is that of willfully and knowingly making or causing to be made any statement *in* any application,

document or report required by law or regulation to be filed, which statement was false or misleading with respect to any material fact. The offending statement must be contained in the application, document or report so filed or required to be filed. The indictment herein does not accuse the petitioner of doing that which the statute forbids. It charges only that he made false and misleading statements *with respect to material facts* in certain applications, documents and reports required to be filed with the New York Stock Exchange by the Securities Exchange Act of 1934. The indictment thus seeks to go beyond the statutory condemnation and embrace activities foreign to the statute itself. The allegations of the indictment are consistent with innocence. The elements of the statutory offense are not alleged.

Examples readily suggest themselves which illustrate and underscore the distinction between the offense as defined in the statute and as charged in the indictment. Let us assume, for instance, that a financial statement was one of the documents required by the Securities Exchange Act of 1934 and the rules and regulations of the Securities and Exchange Commission to be filed with the New York Stock Exchange, and that one was accordingly filed; that it was in all respects and particulars correct; and that it showed the particular company, whose report it was, to be in bad condition. Now, let us assume further that petitioner stated to some one that the company was in sound condition, operating at a profit and had just filed with the Stock Exchange a statement reflecting this condition, when the fact, known to him, and as reported, was that it was unsound, operating at a loss and that the financial statement referred to reflected the true picture. Obviously, in doing so he would be making "false and misleading statements with respect to material facts in certain appli-

cations, documents and reports (to wit, the financial statement) filed and required to be filed with the New York Stock Exchange by the Securities Exchange Act of 1934" and would come squarely within the charge of the indictment. His conduct, however, clearly would fall outside the scope of the statute. The statute punishes the making of a statement *in* an application, document or report required by law or regulation to be filed, which statement is false or misleading with respect to a material fact. It does not prohibit the making of false statements with respect to material facts which appear in applications, documents or reports so filed.

That an indictment must contain the elements of the offense created by the statute is not open to argument.

*United States* v. *Carll* (1881), 105 U. S. 611;
*Brenner, et al.* v. *United States* (C.C.A. 2nd, 1922), 287 Fed. 636;
*United States* v. *Hess* (1888), 124 U. S. 483;
*Williamson* v. *United States* (1908), 207 U. S. 425, 447;
*United States* v. *Simmons* (1877), 96 U. S. 360;
*Shaw* v. *United States* (C.C.A. 8, 1923), 292 F. 339.

The objection hereunder is not a formal one, but one of substance. As in all criminal cases, the pleading, and the statute under which it is drawn, must be strictly construed in the light most favorable to the presumed innocence of the defendant. (*Prussian* v. *United States* (1931), 282 U. S. 675; *St. Louis Merchants' Bridge Terminal Ry. Co.* v. *United States* (C.C.A. 8, 1911), 188 Fed. 191; *United States* v. *J. H. Winchester & Co. Inc.* (C.C.A. 2, 1930), 40 Fed. (2) 472.) Of course, this does not mean that the

statute must be so narrowly interpreted as to defeat its obvious purpose and to reject the plain legislative intent. Rather, the effort must be at all times, wherever possible, so to construe the act as to achieve its full purpose. (*United States* v. *Corbett* (1909), 215 U. S. 233; *United States* v. *Wishnatzki, et al.* (C.C.A. 2, 1935), 77 Fed. (2d) 357.)

Nevertheless, where, as in the case at bar, a statute is enacted which creates and prescribes the punishment for a new offense, such statute must be strictly construed and must clearly state, among other things, the persons and acts coming within the scope of its condemnation. Defects in a statute cannot be supplied by implication or intendment nor can the statute be expanded by pleading or judicial construction to cover transactions not clearly embraced within it. (*United States* v. *Resnick, et al.* (1937), 299 U. S. 207; *United States* v. *Weitzel* (1918), 246 U. S. 533; *St. Louis Merchants' Bridge Terminal Ry. Co.* v. *United States, supra; United States* v. *Missouri Pac. Ry. Co.* (C.C.A. 8, 1914), 213 Fed. 169; *Northern Pac. Ry. Co.* v. *United States* (C.C.A. 8, 1914), 213 Fed. 162, aff'd *United States* v. *Northern Pacific Railway Company* (1916), 242 U. S. 190.)

In *St. Louis, etc.* v. *United States, supra,* the Court stated as follows at page 193:

> "A penal statute which creates and denounces a new offense, and the act under consideration is such a statute, should be strictly construed. A man ought not to be punished unless he falls plainly within the class of persons specified as punishable by such a law. The definition of offenses and the classification of offenders are legislative and not judicial functions, and where, as in the case at bar, a penal statute is plain and unambiguous, the courts

> may not lawfully extend it to a class of persons who are excluded from its effect by its terms, nor by interpolation or construction after their commission make acts offenses which were not clearly such by the expressed will of the legislative department. The creation of an offense by *ex post facto* construction is as pernicious as its creation by an *ex post facto* law."

In *United States* v. *Missouri Pac. Ry. Co., supra,* at pages 174-175, the Court spoke to like effect as follows:

> "* * * The act created and denounced a new offense. The statute which creates a new offense and prescribes its punishment must clearly state the persons and the acts denounced. An act which is not clearly an offense by the expressed will of the legislative body before it was done may not be lawfully or justly made such by construction after it is committed, either by the interpolation of expressions, or by the expunging of its words by the judiciary. * * *"

As was aptly stated by this Court in *United States* v. *Noveck* (1926), 271 U. S. 201, 204:

> "* * * Statutes will not be read to create crimes, or new degrees or classes of crime, unless the purpose to do so is plain. * * *"

It is plain from what has gone before that the indictment herein is fatally defective in that it fails to charge a crime.

## CONCLUSION

**For the foregoing reasons, it is submitted that the fundamental questions involved in this application are of sufficient importance to require the exercise of this Court's supervisory jurisdiction by a writ of certiorari.**

February 10, 1941.

Respectfully submitted,

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